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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION OF ARIZONA WATER COMPANY TO EXTEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY IN CASA GRANDE, PINAL COUNTY, ARIZONA

Docket No. W-01445A-03-0559

ARIZONA WATER COMPANY'S REPLY IN SUPPORT OF MOTION TO STRIKE CORNMAN TWEEDY'S IRRELEVANT TESTIMONY AND EXHIBITS

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Arizona Water Company hereby submits this Reply in support of its Motion to Strike Cornman Tweedy's Irrelevant Testimony and Exhibits. Staff agrees with Arizona Water Company's conclusions as to the limits that the Supreme Court in *James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d 404 (1983) has placed on the scope of these deletion proceedings Staff, however, does not favor the Motion to Strike Cornman Tweedy's testimony, even though that testimony is inconsistent with the Staff's analysis of the standard of proof required by *James P. Paul.*

Cornman Tweedy's lengthy efforts to distinguish *James P. Paul* lack any merit. None of the arguments presented in Cornman Tweedy's 20-page brief support its claim that the standard of proof required by *James P. Paul* is inapplicable to the facts in this matter or allow expansion of the scope of these proceedings beyond the limits set by Arizona law.

I. Arizona Water Company Agrees With Staff's Conclusions, But Believes That The Motion To Strike Is Well Taken.

Arizona Water Company believes that the Staff brief accurately sets forth the governing standards in this remanded proceeding. However, Arizona Water Company disagrees with Staff that a motion to strike is inappropriate. Although motions to strike are infrequent in Commission practice, in the unique circumstances presented here a motion to strike is well justified. Staff's brief correctly recognizes that the scope of this proceeding is limited to deletion issues, and that Cornman Tweedy has attempted to interject matters and unduly burden the record in this proceeding with issues that are inconsistent with the proper scope of deletion proceedings. Under these circumstances, a motion to strike is appropriate.

II. Even If the Commission Remanded for Proceedings "Broad in Scope," Those Proceedings Must Still Be Consistent with Arizona Law.

In its responsive brief, Cornman Tweedy tries to make to much of the limited language in Decision No. 69722 that the proceeding on remand should "be broad in scope so that the Commission may develop a record to consider the overall public interest underlying service to the Cornman property. . ." However, even providing for a remand hearing in the face of uncontroverted facts that Arizona Water Company is ready, willing and able to serve has already stretched the scope of these proceedings to their legal limit. It is beyond dispute that the Commission must act consistent with Arizona law and its constitutional and statutory authority. Implied in every finding in Decision No. 69722 must be the words "consistent with Arizona law. . . ." Even proceedings "broad in scope" must still be conducted consistently with governing law, and allowing Cornman Tweedy to introduce evidence that is clearly irrelevant violates Arizona law and justifies granting Arizona Water Company's Motion to Strike.

Cornman Tweedy concedes that Arizona Water Company's "statement of the scope of this remand proceeding is clearly based on the standard set forth in *James P. Paul*." Response at 8. Cornman Tweedy then accuses Arizona Water Company of "surreptitiously advocating the legal standard set forth in *James P. Paul*," which Cornman Tweedy also

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concedes "would preclude the Commission from deleting the Cornman Tweedy Property from the area conditionally granted in Decision No. 66893 unless the Commission found that [Arizona Water Company] is unable or unwilling to provide utility service to the property at reasonable rates." Response at 9. Despite Cornman Tweedy's conspiratorial tone, there is nothing "surreptitious" about Arizona Water Company's reliance on *James P. Paul* and nothing sinister about requiring that these deletion proceedings comply with Arizona law.

None of the lengthy arguments presented by Cornman Tweedy in its Response support its attempt to escape the requirements of *James P. Paul.* Cornman Tweedy attempts, but fails, to distinguish the facts of *James P. Paul* from those presented here. Response at 9. Like the James P. Paul Water Company, Arizona Water Company has held the Certificate of Convenience and Necessity ("CC&N") for the Cornman Tweedy property for a number of years (since April 2004), although it is not yet providing water service to customers on the Cornman Tweedy property. As in *James P. Paul*, a competing water company, Picacho Water Company, holds the CC&N for neighboring property, and the competing water company has common ownership with the objecting property owner. Likewise, the landowner here clearly seeks to ensure that its captive water company provides water service rather than the holder of the existing CC&N. As in *James P. Paul*, the objecting landowner here contends that there is no need for water service. *See James P. Paul*, 137 Ariz. at 430 n.4, 671 P.2d 408 n.4 ("It appears that Paul was not providing service because no demand for service had been made upon it by North Valley Investors, the company which had plans to develop the subject property. The fact that Jerry Nelson, sole owner of Pinnacle [Paradise Water Company, the neighboring competitor], had a 50% interest in North Valley Investors, might explain this failure to make a demand."). The facts and tactical maneuvers of the objecting landowner in *James P. Paul* might have served as a template for Cornman Tweedy's behavior in this matter, which is as blatantly manipulative as the behavior of the *James P. Paul* landowner.

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Cornman Tweedy also contends that an earlier case, *Arizona Corporation Commission v. Arizona Water Company*, 111 Ariz. 74, 523 P.2d 505 (1974), presented facts more similar to the facts in this matter and therefore that case controls. However, as the Supreme Court recognized in *James P. Paul*, the *Arizona Water Company* case involved an initial grant of a CC&N between competing applications. 137 Ariz. at 430, 671 P.2d at 408. Here, the initial grant of the CC&N took place long ago, in April 2004. Moreover, there was no competing applicant at that time, and Picacho Water Company has now withdrawn its subsequently-filed competing application to serve the subject property.

Cornman Tweedy also seeks to distinguish *James P. Paul* by arguing that that case involved a CC&N "granted years earlier" by reason of which "the Commission's review is more limited." Response at 11. But the Commission granted Arizona Water Company a CC&N to serve the property now owned by Cornman Tweedy three and a half years ago, in April 2004 (following an application in August 2003 and a public hearing in February 2004). Moreover, *James P. Paul* never suggested that the length of time since the grant of the CC&N affected the relevant test for deletion of a CC&N – that is whether the CC&N holder "has failed to supply [utility] service at a reasonable cost to customers." 137 Ariz. at 429, 671 P.2d at 407.

Cornman Tweedy argues that *James P. Paul* has no application to the facts of this case because that decision involved a petition filed by a competitor, while this matter involves remanded proceedings in "the same docket" and "one continuous proceeding." Response at 11 & 12. Again, Cornman Tweedy's manufactured distinction has not basis in *James P. Paul* – which never addressed procedural niceties such as whether the deletion proceeding took place in the "same docket" as the initial grant of the CC&N. Rather, *James P. Paul* simply presents the required test necessary for *any* deletion proceeding.

Cornman Tweedy also contends that *James P. Paul* is distinguishable because "Cornman Tweedy has not asked the Commission to delete the CC&N and give it to [Arizona Water Company's] competitor." Response at 12. Of course much of Cornman

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Tweedy's challenged testimony expressly supports its captive utility, Picacho Water Company, serving the subject property, and thus must be excluded for lack of relevancy. As with Cornman Tweedy's other arguments, the holding of *James P. Paul* does not depend on any such distinction. The Supreme Court announced the test for *any* deletion proceeding, not just a deletion proceeding where there is a competing application. Moreover, even if the pending competing application by Picacho Water Company had not been withdrawn, Cornman Tweedy is certainly offering evidence as if there were still such an application pending, and every one of its witnesses attempts to compare Arizona Water Company's service with Picacho Water Company's service. Cornman Tweedy's claim that it only seeks restoration of the *status quo ante* and that Arizona Water Company could re-apply for its CC&N "at such time that a request for service is made," Response at 12, ignores the fact that the previous owner of the Cornman Tweedy property already requested service from Arizona Water Company more than four years ago.

Cornman Tweedy, fearful that footnote 3 of *James P. Paul* destroys its argument on alleged lack of current necessity, claims that footnote 4 supports its claims. Response at 13. Cornman Tweedy is again frantically grasping at straws in its failing effort to distinguish *James P. Paul* from the facts presented here. In footnote 3, the Supreme Court made it clear that an alleged lack of necessity for water service "does not justify the Commission's decision" to delete the Paul water company's CC&N, a holding which fully supports Arizona Water Company's argument. 137 Ariz. at 429 n.3, 671 P.2d at 407 n.3. In footnote 4, the Supreme Court makes it clear that the alleged lack of necessity was derived from the landowner's own self-serving tactical maneuver of refusing to request service from the CC&N holder in the hope that its affiliated water company would eventually receive the CC&N instead. 137 Ariz. at 430 n.4, 671 P.2d at 408 n.4. Cornman Tweedy likewise seeks to ignore the request for service made by its predecessor and now contends that no need for service exists, in the hope that its affiliated water company will eventually be certificated to provide service instead of the lawful CC&N holder, Arizona Water Company.

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Despite its frantic attempts to escape the limitations that *James P. Paul* places on this deletion proceeding, Cornman Tweedy also argues that proffered testimony would be relevant "even if *James P. Paul* were applicable in this case." Response at 14. Cornman Tweedy suggests with no proof whatsoever that an alleged lack of "integrated water and wastewater service" and alleged need for "additional facilities" might lead to a finding that Arizona Water Company "is unable or unwilling to provide needed utility service at reasonable rates." *Id.* Cornman Tweedy's argument contains fallacies almost too numerous to identify. To begin, Cornman Tweedy has inconsistently contended that no need for water service exists and that its prior owner's request for service from Arizona Water Company should be disregarded. Moreover, the Commission had already ordered that Arizona Water Company apply its approved rates to the Cornman Tweedy property – which rates the Commission has found to be reasonable as a matter of law. There is also no basis for Cornman Tweedy's claim that "additional facilities" would need to be constructed to serve its property. In short, Cornman Tweedy's proffered evidence on "integrated" services and alleged "duplication" of facilities has no relevance to the permissible issues in the deletion proceeding under Arizona law.

III. Cornman Tweedy's Other Arguments Do Not Support a Denial of the Motion to Strike.

Recognizing that its arguments to distinguish *James P. Paul* will necessarily fail, Cornman Tweedy also argues that it is "unnecessary" to decide Arizona Water Company's Motion to Strike. Response at 14-16. Cornman Tweedy argues that motions to strike are "not a usual occurrence" in Commission proceedings and that granting the motion to strike would leave "very little for the evidentiary hearing." *Id.* at 15, 14. Cornman Tweedy is correct – but that does not mean Arizona Water Company's motion should be denied. Rather, when the Arizona Supreme Court has clearly provided the permissible considerations in a deletion proceeding, it makes little sense to waste the time of the Commission and the parties by allowing Cornman Tweedy to present mounds of irrelevant

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testimony, especially where, as here, *James P. Paul* clearly precludes such evidence.

Cornman Tweedy also argues that it should be allowed to present its irrelevant testimony and exhibits *because* the evidence contains nothing new and repeats Cornman Tweedy's prior arguments: "In each of these instances [that is, at prior times challenging Decision Nos. 66893 and 69722, including its application for a rehearing and reconsideration], Cornman Tweedy presented evidence and made legal arguments all relating to the issues raised in the pre-filed testimony and exhibits that [Arizona Water Company] now seeks to strike." Response at 17. In other words, Cornman Tweedy argues that, because it made these rejected arguments on prior occasions, it should be allowed to make them again. The opposite is true. Cornman Tweedy has made the same arguments on a number of prior instances, they have been rightfully rejected, and because of the limited focus of the issues in this proceeding, Cornman Tweedy should not be allowed to raise them yet again.

Cornman Tweedy also relies heavily upon proposed but never adopted amendments to the Recommended Opinion and Order of June 12, 2007. *See* Response at 4-5, 8. Those rejected amendments clearly are not precedent and certainly are not evidence that can be used in this case. Even if those proposed amendments had been adopted, which they were not, they could not alter the test established by the Arizona Supreme Court in *James P. Paul* as the standard of proof required to support deleting a portion of an established CC&N under Arizona law.

Finally, Cornman Tweedy also argues that it should be allowed to present its irrelevant evidence because the Commission *denied* Cornman Tweedy's application for a rehearing and reconsideration of Decision No. 69722. Response at 5-7, 20. According to Cornman Tweedy's logic, denial of its application for rehearing somehow meant that the Commission agreed with Cornman Tweedy's position, and that "since the Commission did not grant the Application for Reconsideration, Cornman Tweedy believes the Commission has already determined that it would be inappropriate to use *James P. Paul* as the basis" for

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this deletion proceeding. Response at 7. Cornman Tweedy should know very well that the Commission cannot set aside the Arizona Supreme Court's ruling in *James P. Paul*, and it is preposterous for Cornman Tweedy to contend that the Commission *impliedly* did so when it denied Cornman Tweedy's application for rehearing and reconsideration of Decision No. 69722. The *denial* of a motion for reconsideration cannot be credibly presented as evidence that the tribunal agrees with the unsuccessful movant. Under Cornman Tweedy's nonsensical argument, the rejected Pinnacle Pradise Water Company somehow won in *James P. Paul*. That is absurd and it is not Arizona law. The Commission denial of Cornman Tweedy's Application for Reconsideration counts as a denial of the relief requested. Therefore, the standards of proof set forth by the Arizona Supreme Court in *James P. Paul* apply to a litigant like Cornman Tweedy that seeks to persuade the Commission to delete a portion of an established CC&N. Not only does much, if not all, of Cornman Tweedy's challenged evidence and testimony not satisfy Cornman Tweedy's burden of proof, it fails even to address the issues required under the *James P. Paul* test. Because of that failure, the Commission should exclude the challenged portions of Cornman Tweedy's proffered evidence and testimony.

CONCLUSION

For the foregoing reasons, and the reasons presented in Arizona Water Company's opening motion papers and much of the Staff's brief, the Commission should grant Arizona Water Company's Motion to Strike Cornman Tweedy's Irrelevant Testimony and Exhibits.

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